

**STATEMENT OF
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**BEFORE THE
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS
UNITED STATES SENATE**

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Thank you for the opportunity to discuss the provisions of the Fair Labor Standards Act (FLSA) that have application to workers with disabilities. I will address two specific provisions, the Special Minimum Wage program contained in section 14(c) of the FLSA and the definition of “wages” contained in section 3(m).

The FLSA, since its enactment in 1938, has contained provisions designed to prevent the curtailment of opportunities for employment of workers with disabilities by authorizing employers, after receiving certification from the Department of Labor, to pay wage rates less than the federal minimum wage to employees whose earnings and productive capacities are impaired by a disability. Let me begin by saying that while the Wage and Hour Division (WHD) is committed to enforcement of all the laws under the WHD’s jurisdiction, the staff of the agency are particularly committed to ensuring that vulnerable populations, such as workers with disabilities and youth, are protected from exploitation. As I will highlight, our accomplishments in clarifying the requirements of section 14(c), increasing both staff and staff knowledge within this program, providing ongoing compliance assistance to all stakeholders, and conducting targeted enforcement initiatives have contributed to more compliant workplaces for workers with disabilities.

Like all regulatory enforcement agencies, WHD employs a variety of tools and activities to enforce the law and achieve compliance. The agency’s mission is to promote and achieve compliance—not just to identify violations after they occur, but to prevent the violations in the first instance, particularly when workers may be at risk, may not be

aware of their rights or are unable to assert those rights,. Before I address this agency's enforcement of the special minimum wage program, I will discuss the certification process and the statutory and regulatory requirements of section 14(c).

Certification under FLSA Section 14(c)

The Department's regulations administering section 14(c) are contained at 29 C.F.R. Part 525. Section 14(c) permits the payment of a special minimum wage—one that is less than the federal minimum wage—to workers who have disabilities that impair their earning and productive capacities for the work being performed. Most workers in this country who have disabilities are not and should not be receiving a special minimum wage because their on-the-job productivity is the same as other workers through training, workplace accommodations and their own ability and determination. I cannot stress strongly enough that payment of a special minimum wage is not an option solely because a worker has a disability. The disability must impair the worker's productivity for the job he or she is actually performing. A WHD investigator, when conducting an investigation, routinely reviews medical documentation, production records, and supervisor notes to ensure that each worker receiving a special minimum wage under section 14(c) not only has a disability, but that disability impairs his or her production.

Prior to paying a special minimum wage, and at periodic intervals depending upon the nature of establishment, the employer must apply for and receive a certificate issued by WHD. The employer must complete and submit the *Application for Authority to Employ Workers with Disabilities at Special Minimum Wages* (Form WH-226), and in the case of renewal applications where special minimum wages have been paid in the recent past, the employer must also complete and submit the *Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages* (WH-226A). The latter form, which must be submitted for every establishment or worksite where workers with disabilities were employed at special minimum wages during the employer's last completed fiscal quarter, requires information about each worker who received a special minimum wage, including the name, primary disability of

the worker, the type of work performed, and the average earnings per hour of the worker. Both forms may be downloaded from the WHD Web page.

In 1994, the WHD centralized all processing of applications to pay special minimum wages in Chicago. The portion of the WHD National Certification Team that processes applications under section 14(c) is composed of three WHD Compliance Specialists trained in the requirements of section 14(c), the certification process, and customer service; one clerical support staff, and a supervisor. The Compliance Specialists review applications for completeness, accuracy, and compliance. If there are deficiencies or errors in the application, the Compliance Officer will contact the employer in order to correct those deficiencies or errors. An important aspect of both the section 14(c) certification and enforcement processes is the statutorily required employer representations and written assurances included on the WH-226. These statements constitute a written acknowledgement by the employer that it not only understands the requirements of section 14(c) but will comply with those requirements. Applications for certification are denied if the applications are incomplete, in error, or reflect noncompliance with the provisions enforced by WHD.

Once the National Certification Team approves the application, a certificate authorizing the payment of special minimum wages will be issued (Form WH-228-MIS). Approximately 2,050 applications are reviewed each year. The WHD issues four different types of certificates under section 14(c):

- Community Rehabilitation Center (CRP) certificates, which are issued for a two-year period. CRPs (formerly known as sheltered workshops and also known as work centers) are establishments that specialize in the employment of workers with disabilities and normally provide rehabilitation, life-skill, therapeutic, and recreation services for clients.
- Hospitals and residential care facilities may also employ their patients as patient workers. These Patient Worker certificates are also issued for two-year periods.

- For-profit business establishments (such as fast food establishments, retail stores, and mail distribution centers) may also receive certificates. These certificates are issued for a one-year period.
- School Work Experience Program (SWEP) certificates are issued to schools, allowing them to place their students with disabilities with employers in a “joint employment” situation. If all the conditions of section 14(c) are met, the employer may pay the student with a disability that impairs his or her production for the work being performed a special minimum wage under the SWEP certificate issued to the school.

All section 14(c) certificates expire. Each certificate is issued with an expiration date. Approximately 90 days before the expiration date, the National Certification Team will forward to the employer a renewal package pre-populated with application data. If the application is not received by the National Certification Team, reminder notices are forwarded to the employer 60 days before the certificate expiration date and again 30 days before the expiration date if necessary. If the renewal application is not received prior to the expiration date, the National Certification Team will advise the employer, by letter, that the certificate has expired and it no longer has authority to pay workers with disabilities a special minimum wage.

Some firms advise the National Certification Team that they no longer require certification. Employer reasons for non-renewal vary, but as the Department advised the Government Accountability Office when responding to its 2001 Report, those reasons include:

- The productivity of employees with disabilities may increase to the point where earnings exceed the federal minimum wage and thus subminimum wage authority may not be needed until newer, less productive employees come to the work center.

- Employment opportunities may not be available for workers with disabilities at certain times during the two-year certification period as contracts end and start throughout the period.
- Participation in many state and private programs—and the accompanying funding critical to the viability of the work centers—often requires a current certificate authorizing the payment of special minimum wages. In some circumstances the funding enables the work centers to raise the pay of some workers with disabilities to the full federal minimum wage, even though the worker’s productivity would justify the payment of a subminimum wage.

The National Certification Team does follow-up on the approximately 250 employers that do not respond to our renewal notices each year. It has been our experience that about 100 of the former certificate holders may be removed from the data base as a result of records checks or phone calls. Often employers are no longer in business or have merged with other certificate holders. The remaining 150 employers who did not renew, receive letters inquiring as to whether it was their intention to allow the certificate to expire. Of that number, about 45 employers contact the WHD stating the certificate authority is no longer required or desired. About 60 employers each year reply that they wish to renew their authority and submit an application. The remaining 45 employers never respond to our letter of inquiry.

Once the employer receives a certificate, it must inform each worker with a disability who will be receiving special minimum wages, or his or her parent or guardian if appropriate, both orally and in writing, of the terms of the certificate. This may be accomplished by posting or making copies of the certificate available. In addition, employers paying special minimum wages must display, or make available to workers, the *WHD Poster Employee Rights for Workers with Disabilities Paid at Special Minimum Wage Rates* (Form WH-1284).

Statutory and Regulatory Requirements of Section 14(c)

The FLSA requires that a special minimum wage under section 14(c) be a commensurate wage rate; one that is based on the worker's individual productivity in proportion to the wage and productivity of experienced nondisabled workers performing essentially the same type, quality, and quantity of work in the vicinity in which the individual is employed (see 29 C.F.R. § 525.525.3(i)). This requires that the employer identify and define the job that will be performed by the worker who will be receiving the special minimum wage, establish detailed standards for the job in terms of quality and quantity of production, and accurately determine the productivity of workers who do not have disabilities that impact their productivity when performing that job using an acceptable industrial work measurement process. These steps, which establish the standard for the job, must be performed for every job that will be performed by a worker paid a special minimum wage. This process must be performed again when any aspect of the job is changed—such as when the type of equipment or materials being used are changed, the number of items being handled in a production cycle is altered, or when production methods are reorganized.

The employer would then normally measure the productivity of each worker with a disability who will be employed to perform the work, in order to compare the performance of the worker with a disability in terms of quality and quantity of production, and establish a commensurate rate. For workers who will be paid on an hourly basis, the regulations require that his or her productivity be measured within the first 30 days of employment and at least every 6 months thereafter. New measurements must be conducted when an employee changes jobs. Employers are not required to conduct work measurements of workers who are paid on a piece rate basis as once the standard for the job has been accurately established, every worker's productivity, whether the worker has a disability or not, will be determined by the number of pieces he or she completed.

The employer must also determine the prevailing wage paid to experienced workers performing that job in the same vicinity as the workers with disabilities who will be paid under the authority of section 14(c). In most cases, employers will be required to annually survey a representative number of employers who employ experienced workers performing the same type of work in the area to determine the prevailing wage. Additional reviews of prevailing wages are required when state or federal minimum wages are increased. Surveys are not necessary if the work is subject to the McNamara-O'Hara Service Contract Act (SCA), as the contract will normally provide the prevailing wage rate for each job; or when the employer's workforce is comprised mostly of experienced workers who do not have disabilities performing the same work as those paid under the terms of the section 14(c) certificate. Employers are required to submit samples of actual work measurements and prevailing wage surveys when submitting Form WH-226 to renew a section 14(c) certificate.

The FLSA and regulation also require that an employer paying special minimum wages under section 14(c) create and retain certain records in addition to those normally maintained by employers. These records include documentation of each employee's disability and how that disability impairs the employee's productive and earning capacities for the job being performed. Records detailing the work measurements conducted for each job, the prevailing wage rates determined, and individual worker productivity must also be preserved.

WHD's Enforcement and Administration of FLSA Section 14(c)

The agency's special minimum wage activities and initiatives are far too numerous to list individually, so I will point out our key efforts and accomplishments over the past several years.

The WHD has spent considerable resources reinvigorating its section 14(c) program since 1994. It is important to note that certified employers represent less than .07 percent of the approximately 7 million FLSA covered work places in the U.S.

Workers with disabilities receiving special minimum wages account for less than .04 percent of the estimated 130 million workers covered by the FLSA.

For each of the past several years, each WHD regional has conducted a section 14(c) enforcement initiative as part of the agency's strategic plan. Building on a National Compliance Baseline Survey that was conducted by WHD in 2002, the regions have targeted certificated employers with larger numbers of workers paid special minimum wages. On average, WHD has concluded approximately 135 section 14(c) investigations a year over the last five years, and collected \$600,000 in back wages for 3,000 workers on average each year over the five year period.

The Government Accountability Office (GAO) made several recommendations for improving WHD's oversight of section 14(c) in its 2001 Report *Characteristics of Workers with Disabilities and Their Employers, and Labor's Management, Which Needs to Be Improved*, GAO-01-886, dated September 4, 2001. Those recommendations, which included improving the database of certificate actions, tracking staff hours devoted to the 14(c) Program, conducting directed investigations, training staff, and posting the Field Operation Handbook, among other recommendations, have all be implemented. Many of those I have discussed in my testimony today. Several of these recommendations were developed in conjunction with WHD and were actually implemented prior to the publication of the report. The WHD not only implemented all of the GAO recommendations but took additional steps to improve the program.

WHD reinstated the Regional Section 14 Team Leader position. Each of five regions has a senior Compliance Specialist, trained in the FLSA and section 14(c), who coordinates and oversees the enforcement and technical assistance activities of the Region. With the WHD National Office Child Labor and Special Employment Team, through monthly teleconferences, the Regional Section 14 Team Leaders form the Section 14 Working Group, an important advisory body for the program that provides both direction and oversight. The Team Leaders work with the National Certification

Team to ensure the certification process is in sync with the enforcement and technical assistance aspects of the program.

In addition, WHD has created a wide assortment of compliance assistance materials to help employers attain, understand, and maintain compliance with section 14(c). All of these tools are available on the WHD Web page, and many are included with the periodic compliance mass mailings that are sent to certificate holders. For example:

- The WHD Field Operations Handbook chapter dealing with section 14 has been available to all stakeholders on the WHD Web page since at least 2003.
- The Section 14(c) *e-laws* Advisor, an electronic interactive compliance tool that allows interested parties to learn about the program and research specific areas of Section 14(c) has also been operational for several years.
- WHD has developed a series of seven fact sheets that provide specific information about various compliance requirements of section 14(c). Several of these fact sheets are routinely mailed to certificate holders during the certificate renewal process.
- The section 14(c) Working Group has developed and continues to deliver specialized WHD Investigator section 14(c) training to improve both the enforcement and compliance assistance aspects of the program.
- WHD has partnered with several organizations, including NISH (formerly known as the National Institute for the Severely Handicapped), to educate the regulated community about the requirements of the section 14(c) program.

WHD regional and local district offices will continue to develop enforcement and education initiative to promote compliance with section 14(c).

Definition of “Wage” Under the Fair Labor Standards Act

The FLSA defines the term “wage” in section 3(m) of the Act to include “the reasonable cost . . . to the employer of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to [its] employees.” The implementing regulations codified at 29 C.F.R. Part 531 interpret generally the provisions of section 3(m) of the Act. These provisions apply to special minimum wages under section 14(c) in the same manner as they apply under all other applicable FLSA minimum wage requirements.

Under section 531.3 of the regulations, “[t]he term *reasonable cost* as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished . . . to . . . employees [and] does not include a profit to the employer or to any affiliated person.” In addition, “the ‘reasonable cost’ to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation . . . arrived at under good accounting practices.” Furthermore, “[t]he cost of furnishing ‘facilities’ found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.” *See* 29 C.F.R. 531.3(a), (b), (c), and (d).

The FLSA record keeping regulations at 29 C.F.R. 516.27 govern the information and data that employers must keep with respect to any deductions from and additions to wages for board, lodging, or other facilities furnished to employees. Such records must include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost that is claimed by an employer. While no particular degree of itemization is prescribed, the amount of detail required must show, consistent with good accounting practices, sufficient information to enable the Wage and Hour Division to verify the nature and amounts of expenditures claimed by an employer as the reasonable cost of furnishing employees with board, lodging, or other facilities.

Section 3(m) of the FLSA provides a statutory definition of the term “wage.” This provision is not an exemption or exception to the applicable minimum wage or overtime requirements. Rather, it provides the statutory parameters for making determinations of the reasonable costs to employers of furnishing employees with board, lodging, or other facilities that may be credited towards meeting the FLSA’s monetary obligations. All investigations conducted by WHD, whether initiated by complaints or as part of a directed, targeted enforcement initiative, should include an evaluation of the appropriateness of an employer’s claim for credit against wages for furnishing board, lodging, or other facilities to employees pursuant to the requirements of section 3(m) of the FLSA.

Mister Chairman, this concludes my prepared remarks. I will be happy to answer any questions that you or the Members of the Subcommittee may have.